

No. 83-935

Office Supreme Court, U.S.
FILED
JUL 30 1984
ALEXANDER L STEWART,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

UNITED STATES OF AMERICA, *Petitioner*,
v.

JOHN CLYDE ABEL, *Respondent*.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

PETER M. HORSTMAN
Acting Federal Public Defender
YOLANDA BARRERA GOMEZ
Senior Deputy Federal Public Defender
Suite 1503, United States Courthouse
312 North Spring Street
Los Angeles, California 90012-4758
Telephone (213) 688-4786
FTS 798-4786
Attorneys for Respondent
JOHN CLYDE ABEL
OF COUNSEL:
JUNE G. GUINAN
Attorney

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

2888
BEST AVAILABLE COPY

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES CITED	ii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	7
A. Mills Was Improperly Impeached By Evidence That He And Respondent Belonged To A Secret, Prison Organization That Required Its Members To Com- mit Perjury To Protect Other Members.	7
1. The disputed cross-examination of Robert Mills was introduced to attack his credibility, not to show bias.	7
2. Extrinsic evidence of specific instances of mis- conduct may not be introduced to attack the credibility of a witness.	10
3. The intentional references to a secret, prison organization had no relevance to the charge.	12
4. Membership in an organization does not prove that a member has espoused the beliefs of the organization.	14
5. Assuming the impeachment evidence showed bias, the trial judge abused his discretion in permitting its introduction.	18
B. The Prejudicial Harm Of The Evidence At Issue Outweighed Its Probative Value.	21
CONCLUSION	23

TABLE OF AUTHORITIES

CASES:	Page
<i>Blair v. United States</i> , 401 F.2d 387 (D.C. Cir. 1968) .	19
<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1968)	6, 16, 17, 18
<i>Davis v. Alaska</i> , 415 U.S. 308 (1974)	18
<i>Michelson v. United States</i> , 335 U.S. 469 (1948)	22
<i>Pierson v. Ray</i> , 386 U.S. 547 (1967)	12
<i>Scales v. United States</i> , 367 U.S. 203 (1960)	6, 16, 17, 18
<i>Skinner v. Cardwell</i> , 564 F.2d 1381 (9th Cir. 1977) <i>cert. denied</i> , 435 U.S. 1009 (1978)	6, 19
<i>United States v. Bleckner</i> , 601 F.2d 382 (9th Cir. 1979) .	19
<i>United States v. Brown</i> , 547 F.2d 438 (8th Cir.) <i>cert. denied</i> , 430 U.S. 937 (1977)	19
<i>United States v. Bufalino</i> , 683 F.2d 639 (2d Cir. 1982) <i>cert. denied</i> , 459 U.S. 1104 (1983)	5, 6, 13
<i>United States v. Crawford</i> , 438 F.2d 441 (8th Cir. 1971) .	15
<i>United States v. Cutler</i> , 676 F.2d 1245 (9th Cir. 1982) .	19
<i>United States v. Fox</i> , 473 F.2d 131 (1972) (D.C. Cir. 1972) .	21
<i>United States v. Gosser</i> , 339 F.2d 102 (6th Cir.) <i>cert. denied</i> , 382 U.S. 819 (1964)	15
<i>United States v. Labarbera</i> , 581 F.2d 107 (5th Cir. 1978) .	15
<i>United States v. Love</i> , 534 F.2d 87 (6th Cir. 1976)	12
<i>United States v. Marques</i> , 600 F.2d 742 (9th Cir. 1979) <i>cert. denied</i> , 444 U.S. 1019 (1980)	12
<i>United States v. Mills</i> , 704 F.2d 1553 (11th Cir. 1983)	5, 6, 12, 13, 14
<i>United States v. Ochoa</i> , 609 F.2d 198 (5th Cir. 1980)	6, 15
<i>United States v. Robinson</i> , 530 F.2d 1076 (D.C. Cir. 1976)	10, 11, 21
<i>United States v. Salsedo</i> , 607 F.2d 318 (9th Cir. 1979) .	19
<i>United States v. Turcotte</i> , 515 F.2d 145 (2d Cir.) <i>cert. denied</i> , 423 U.S. 1032 (1975)	15
<i>United States v. Vigo</i> , 435 F.2d 1347 (5th Cir.) <i>cert. denied</i> , 403 U.S. 908 (1971)	15
<i>United States v. Woods</i> , 550 F.2d 435 (9th Cir. 1976)	5, 10, 11

Table of Authorities Continued

	Page
RULES AND STATUTES:	
Rule 34.2 of the Supreme Court Rules	1
Federal Rules of Evidence:	
Rule 401	12
Rule 403	2, 12, 21
Rule 608(b)	2, 4, 5, 8, 9, 10, 11
MISCELLANEOUS:	
J. WEINSTEIN and M. BERGER, WEINSTEIN'S EVIDENCE, § 607[03] (1982 Ed.)	7
J. WEINSTEIN and M. BERGER, WEINSTEIN'S EVIDENCE, § 608[05]	9, 10
Smith Act	16

STATEMENT OF THE CASE

Pursuant to Rule 34.2 of the Supreme Court Rules respondent submits the following statement of the case to correct and add to the factual background presented by petitioner.

1. The admission of the disputed evidence regarding the Aryan Brotherhood, referred to at trial as a "secret prison organization," was discussed in chambers prior to the trial. At one point during these discussions, petitioner conceded that references to the Aryan Brotherhood and respondent's involvement would be irrelevant unless respondent took the stand. (R.T. 36).¹ Later in the discussions, petitioner changed its position and argued that evidence of membership in the Aryan Brotherhood was admissible to impeach Mills' credibility. (J.A. 8-9).

Respondent repeatedly objected to any references to the Aryan Brotherhood or to the mention of specific tenets of the organization. Respondent objected on relevancy grounds (J.A. 9, 10, 14), and on the basis that the prejudice outweighed the probative value. (J.A. 14, 18, 19, 27, 29).²

¹ "R. T." refers to Reporter's Transcript; J.A. refers to Joint Appendix; "Pet. Brief" refers to Petitioner's Brief.

² At page five of petitioner's brief, a partial quote of defense counsel's objection to any use of the Aryan Brotherhood is set out. Petitioner argued that the court's ruling that "a secret, prison organization" query was permissible eliminated the basis of defense counsel's objection. This argument is based on a misreading of respondent's objections. (J.A. 38). Defense counsel not only objected to the use of the phrase "Aryan Brotherhood" but she stated she had the same objections made in chambers earlier and she objected to any reference to any motto, (J.A. 38), of the Aryan Brotherhood. The court also on the record noted that objections made in chambers were not waived.

Specifically, respondent objected to the proposed cross-examination of Mills. Respondent suggested that the only permissible cross-examination of Mills should be: "Isn't it true that Abel has ordered you to give this testimony? Isn't it true that you're lying, that you're doing this to help your friend Abel?" (J.A. 19).

During these *in camera* discussions the trial judge articulated his thoughts about the admission of "Aryan Brotherhood" references. Initially he stated that he failed to see how such evidence could be relevant and noted that it was unduly prejudicial. (R.T. 38). The district judge's final ruling on this issue, however, was that the disputed evidence went directly to the credibility of Mills and, thus, petitioner would be permitted to attack the credibility of Mills by references to the Aryan Brotherhood. (J.A. 29).

During petitioner's direct examination of Kurt Ehle, Ehle was permitted to testify that both Mills and respondent were members of a secret, prison organization (J.A. 41); that respondent was a ranking member of the organization (J.A. 42); and that the organization had a creed that all members must deny their membership and "lie, cheat, steal, kill" or do anything else to protect another member. (J.A. 43).

Petitioner tried in its examination of Ehle to elicit further information about the organization. Petitioner asked Ehle about the measures used by the organization if one disobeyed the code. (R.T. 43). The trial court sustained the objection to this question. In response to a question by petitioner concerning whether Ehle had told

At page six of petitioner's brief, it is stated that defense counsel objected under Federal Rules of Evidence 608 and 403, "but did not elaborate." Petitioner fails to note that this objection was sustained by the trial court making elaboration by defense counsel unnecessary. (J.A.43).

Mills he (Ehle) was fabricating a story about respondent, Ehle stated: "In view of the fact of how close Mills and Abel were, it would be suicide. . . ." (J.A. 44). Petitioner then asked Ehle: "Why do you say it would have been suicide?" Ehle replied: "The penalty for that's death." (J.A. 44). Although the court sustained objections to this line of questioning, petitioner persisted in the same line of questioning, asking Ehle: "Your fear of harm from the secret prison. . . ." Respondent's objection was once again sustained.

Petitioner's brief quotes a statement by defense counsel allegedly admitting the relevance of certain questions about membership. (Pet. Brief p. 4). This quote, however, is taken out of context. Defense counsel's remarks were made, instead, in response to a hypothetical posed by the trial judge. (J.A. 28). Prior to addressing this hypothetical, defense counsel had argued that the proposed questioning of Mills and Ehle concerning the Aryan Brotherhood was irrelevant to the bank robbery charge against respondent. (J.A. 27). Such objection was never withdrawn.

2. On appeal the United States Court of Appeals for the Ninth Circuit reversed respondent's conviction. The court of appeals noted that although a trial court has broad discretion to admit or exclude evidence, this discretion does not extend to allowing impeachment by association. (Opinion p. 7) The court of appeals held that the trial judge had committed error in allowing Mills to be impeached because of his alleged membership in an organization. Although no evidence was introduced that Mills accepted or complied with the alleged protective perjury tenets of the Aryan Brotherhood, the district court erroneously allowed his impeachment by association with a group that allegedly followed these tenets. The error was reversible because Ehle's testimony implicated the re-

spondent as a member of the organization. Because respondent had not taken the stand, the evidence clearly was not impeachment of him. Rather, this evidence served merely to prejudice respondent by mere association.

SUMMARY OF ARGUMENT

Robert Mills, a defense witness, was improperly impeached by the admission of evidence that both he and respondent belonged to a secret, prison organization whose members were sworn to lie, cheat, steal or kill to protect each other. No evidence was introduced that Mills had personally adopted or complied with the tenets of the organization; nor was there any evidence that Mills had ever lied or expressed a willingness to lie. Thus, the impeachment of Mills was based on his association alone. The error was reversible because the impeachment implicated the respondent who was unable to refute the membership because he had not taken the stand.

1. The existence of a witness' bias is relevant. Questioning a witness regarding his acquaintance or relationship with a party to an action is, thus, permissible cross-examination to elicit possible bias. The cross-examination of Mills, however, was not to elicit possible bias. The cross-examination extended well beyond the permissible scope of inquiry regarding his ties to respondent. Rather, in violation of Rule 608(b) of the Federal Rules of Evidence the interrogation directly attacked Mills' general credibility. Mills was questioned regarding the restrictive aspect of the membership of the secret, prison organization; he was likewise interrogated about the alleged perjury tenet of the organization. The evidence sought did not have a tendency to show bias since it is the shared membership itself which might show bias. The perjurious tenets of the organization itself show a

lack of veracity, but not bias. Thus petitioner's cross-examination was an attack on the general credibility of Mills, rather than an exposure of bias.

2. When Mills was cross-examined regarding membership in the secret, prison organization, he denied being a member and denied even knowing of such an organization. (J.A. 39). In violation of Rule 608(b) of the Federal Rules of Evidence, petitioner was permitted to introduce rebuttal evidence to impeach Mills. This evidence consisted of calling Kurt Ehle to testify that both Mills and respondent were members of a secret, prison organization; that the organization required its members to swear to lie, cheat, steal or kill to protect another member. (J.A. 42). Rule 608(b) prohibits the admission of extrinsic evidence of specific instances of the conduct of a witness for the purpose of attacking his credibility. See *United States v. Woods*, 550 F.2d 435 (9th Cir. 1976). Notwithstanding case law to the contrary, and the clear prohibition of Rule 608(b), Mills' general credibility was impeached solely on the basis of his alleged membership in a secret, prison organization.

3. Evidence of membership was irrelevant to the charge of bank robbery. This evidence served an improper purpose—to prejudice respondent by inflaming the jury. The intentional references to a secret, prison organization portrayed respondent as a ruthless and odious individual—a "bad person." This evidence of membership had no direct relationship with the charge; nor was such membership inextricably intertwined with the charge such that it was necessary for a proper understanding of the charges. *United States v. Bufalino*, 683 F.2d 639 (2d Cir. 1982), cert. denied, 459 US. 1104 (1983) and *United States v. Mills*, 704 F.2d 1553 (11th Cir. 1983) illustrate the types of cases where evidence of membership has

been found permissible. *Abel*, unlike *Buhalino and Mills*, did not involve a chain of facts which necessitated the introduction of such evidence.

4. Aside from being improper, petitioner's attack on Mills' credibility was without foundation. There was no evidence Mills had ever adopted the tenets of the organization. Nor was there any evidence he had ever lied or expressed a willingness to lie. In the absence of such evidence, the impeachment of Mills' based on mere membership was improper. Such impeachment was analogous to impeachment due to "bad company." Credibility or lack thereof is a personal trait and not one that can be imputed to a person based on one's relationships, associations or friendships. *See United States v. Ochoa*, 604 F.2d 198 (5th Cir. 1980).

Further, *Scales v. United States*, 367 U.S. 203 (1960) and *Brandenburg v. Ohio*, 395 U.S. 444 (1968) make clear that merely joining an organization is not dispositive of a person's acceptance of the organization's tenets. A Caucasian man may join a prison organization for protection but may not espouse the tenets of the organization. Thus, an attack on a witness' credibility based solely on his membership is improper cross-examination and rebuttal testimony.

5. Even assuming that the disputed evidence proved bias, the trial judge abused his discretion in declaring the evidence admissible. There are limitations on a court's discretion to allow evidence to show bias. The test is generally whether the jury is "otherwise in possession of sufficient information upon which to make a discriminating appraisal of the subject matter at issue." *Skinner v. Cardwell*, 564 F.2d 1381 (9th Cir. 1977). In this case, before the disputed examination occurred, the prosecutor had elicited or had an opportunity to elicit sufficient in-

formation for the jury to judge the possible bias of Mills. Failure by the judge to limit the cross-examination of Mills resulted in substantial prejudice to respondent. As a result of the judge's failure to exercise proper discretion, the jury heard references to a secret, prison organization, perjury oaths, death threats and suicide missions. (J.A. 42, 43, 44).

6. Finally, even if relevant, the prejudice of the disputed evidence far outweighed its probative value. The evidence presented respondent as a member of a ruthless organization of liars, cheats, thieves, and killers. The inflammatory evidence raised the serious danger that respondent was convicted of being a "bad man" rather than a bank robber.

ARGUMENT

A. Mills Was Improperly Impeached By Evidence That He And Respondent Belonged To A Secret, Prison Organization That Required Its Members To Commit Perjury To Protect Other Members.

1. The disputed cross-examination of Robert Mills was introduced to attack his credibility, not to show bias.

Impeachment by showing that a witness is biased rests on two assumptions: (1) that certain relationships impair the impartiality of a witness, and (2) that a witness who is not impartial may shade his testimony in favor of or against one of the parties. *J. WEINSTEIN and M. BERGER, WEINSTEIN'S EVIDENCE* § 607[03] at 607-23 (1982 Ed.) (hereinafter *Weinstein's Evidence*). Since bias of a witness is relevant to assess credibility, a witness may be cross-examined regarding his relationships with a party.

Petitioner cross-examined Robert Mills regarding his and respondent's alleged membership in a secret, prison

organization that required its members to take a perjury oath.³ These questions were not introduced to show that Mills might be biased in favor of respondent due to their common membership. Rather, they were introduced to attack Mills' general credibility. Such attack is prohibited by Rule 608(b) of the Federal Rules of Evidence.

A witness in a trial may be asked if he shares common membership with a party to an action. Such common membership can at times impair a witness' partiality. Petitioner in this case, however, went much further than merely asking questions designed to elicit such bias. He questioned Mills regarding the tenets of a secret, prison organization.

Evidence that members of an organization have sworn to commit perjury does not show bias. The perjury oath does not enhance in any way the association between two individuals. Rather, such evidence goes directly to the general credibility or veracity of the witness. The argument is no longer that the witness' testimony should be weighed with great caution because he might be biased; the argument becomes that the witness should be disbelieved entirely because he belongs to an organization that requires its members to lie.

³Q Mr. Mills, do you belong to any secret type of prison organization which is restrictive somewhat in its membership?

A No, I don't.

Q Do you belong to any secret-type organization which has as part of its creed or tenets or oath of that organization that the members thereof will first of all deny they belong to that secret organization?

A No, I don't.

Q And do you belong to any secret organization which has as part of its creed that those members who belong to it will lie to protect the members that are in that secret organization, prison organization?

A I know of no organization like that. (J.A. 39).

Rule 608(b) authorizes inquiry into specific instances of misconduct if these instances are "clearly probative of truthfulness or untruthfulness." Federal Rules of Evidence 608(b). An examination of the case law in this area reveals that the instances of misconduct must be by the witness himself, not by an organization.

This proposition can best be exemplified by a hypothetical. Assume that a party has in his possession a letter from a witness wherein he apologizes to a judge for lying in court. The attorney cross-examining the witness may properly ask: "Isn't it true you have lied in court before?" Rule 608(b) permits this inquiry because it is clearly probative of the witness' *personal* character for untruthfulness.

Petitioner argued that because it was proper to show bias through common membership in an organization, evidence that members of an organization are sworn to commit perjury on each other's behalf was even more probative of bias than evidence of mere common membership. (Pet. Brief p. 17).⁴

Although petitioner's initial premise is sound, the ultimate conclusion is not based on logic or case law, but on the naked desire to have the evidence admitted. Petitioner appears to confuse two concepts—bias and credibility. Bias may be shown to *prove* credibility or lack thereof. Petitioner's argument seeks to expand Rule 608(b) which was intended to be restrictive. See *Weinstein's Evidence* § 608[05] at 608-33. Petitioner's argument would allow a wholesale attack on the credibility of every witness by inquiry into every instance of conduct whether these were or were not probative of truthfulness. A trial would

⁴ Although petitioner argued that the cross-examination was proper to show bias, petitioner failed to explain or precisely identify how the questions were probative of bias.

thus degenerate to inquiries which would waste time and confuse the jury.

2. Extrinsic evidence of specific instances of misconduct may not be introduced to attack the credibility of a witness.

Rule 608(b) prohibits admission of extrinsic evidence of specific instances of the conduct of a witness for the purpose of attacking or supporting his credibility. If a witness denies on cross-examination an instance of alleged misconduct pertaining to a collateral matter, the answer stands and witnesses may not be called to rebut it. *See United States v. Woods*, 550 F.2d 435, 441 (9th Cir. 1976); *United States v. Robinson*, 530 F.2d 1076, 1079 (D.C. Cir. 1976). *See also Weinstein's Evidence* § 608[05] at 608-22.

In this case it is clear that the cross-examination of Mills regarding his membership in the secret, prison organization was introduced not to show bias, but to attack his general credibility. When Mills was asked about and denied membership in the secret, prison organization, petitioner was bound by that denial and the district court should not have allowed petitioner to call Kurt Ehle to impeach Mills. Ehle was allowed to testify not only that Mills was a member of a secret, prison organization, but that respondent was also a member. Ehle's testimony went far beyond mere impeachment of Mills' denial of membership when he was allowed to testify that each member of the organization was required to lie, cheat, steal or kill for another member.

This is precisely the situation that the District of Columbia Circuit had in mind when it observed as follows: "If the witness stands his ground and denies the alleged misconduct, the examiner must 'take his answer' and cannot call other witnesses to prove the discrediting acts

lest the trial spin off into a series of subtrials on collateral issues . . ." *United States v. Robinson*, 530 F.2d at 1079. In the case at bar, there is no question that the trial on the bank robbery charge was overshadowed by the infusion of evidence of a secret, prison organization and its evil tenets.

The *Robinson* court did note that there was an exception which did not "limit or exclude proof of conduct by the witness evidencing a specific bias for or against a party." The first question directed solely at whether Mills and respondent were members of the same organization was proper cross-examination to show bias. The membership of Mills in an organization with respondent could arguably have been an indication of a "specific bias" by the witness and thus permitted under the exception. The questions following the initial inquiry about common membership, however, were designed to show that the witness lacked credibility, not to show a specific bias. Consequently, the later questions pertained to a collateral matter and petitioner should have been precluded from asking them because of Mills' denial of membership. That this should have been the proper course at trial finds support in *United States v. Woods*, 550 F.2d 435 (9th Cir. 1976). In that case, a key government witness denied he was wanted for auto theft in Mexico. A defendant in the case sought to call a Mexican police officer to testify that the witness was wanted in Mexico for auto theft. The Ninth Circuit found this evidence to be extrinsic proof on a collateral matter. Although the proof would have shown that the witness was lying on the stand, this proof went to his general credibility as a witness, and, thus, was prohibited by Rule 608(b).

The district court in this case allowed petitioner to do precisely what is prohibited by the Federal Rules of

Evidence and the existing case law; *to wit*, impeach Mills' general veracity.

3. The intentional references to a secret prison organization had no relevance to the charge.

Even under the liberal standard of relevancy enunciated in Rule 401 of the Federal Rules of Evidence, the evidence elicited and proffered by the government was not relevant.

Petitioner failed to adequately articulate how this type of membership evidence was in any way probative of any issue in the case. The issue in the case was identity. Clearly the references to the secret, prison organization did not assist in resolving the main issue of identity. A review of the record reveals that the references to membership were for one sole reason—to inflame the jury.⁵

References to membership in an organization have been permitted in some cases. They have been permitted, however, only when the membership is directly related to the charge; or when it is very difficult to draw a line between the charge and other wrongful circumstances with which it is inextricably intertwined; or if it is necessary in order to complete the story of the crime on trial. See *United States v. Mills*, 704 F.2d 1553, 1559 (11th Cir. 1983).⁶

⁵ See *Pierson v. Ray*, 386 U.S. 547 (1967). (A conviction based on irrelevant and prejudicial evidence can be the basis for a reversal.) See also *United States v. Marques*, 600 F.2d 742 (9th Cir. 1979), *cert. denied*, 444 U.S. 1019 (1980); *United States v. Love*, 534 F.2d 87 (6th Cir. 1976). (It is reversible error for a prosecutor to intentionally inject into a trial the spectre of organized crime where it serves no proper purpose and is without foundation in the evidence.)

⁶ The *Mills* court cautioned that the evidence was still subject to the probative versus prejudicial test of Rule 403 of the Federal Rules of Evidence.

Two cases illustrate these principles and, in doing so, establish the irrelevance of the disputed evidence in this case. In *United States v. Bufalino*, 683 F.2d 639 (2d Cir. 1982); *cert. denied*, 459 U.S. 1104 (1983) the government was permitted to impeach defendant with evidence of his longstanding relationship with La Cosa Nostra. This was permitted because defendant testified falsely that his acquaintance with Fratianno was based on "chance meetings." Defendant's associational ties became relevant because without it, "it was unlikely that the jury would believe that Fratianno would agree to commit the crime . . ." *Id.* at 647. Thus, in *Bufalino*, the purpose of the references to La Cosa Nostra were not to show that defendant was a mobster; rather, the issue of such membership became an integral part of the government's proof of motive and necessary to link the defendant with the "hit-man"-James Fratianno.

In *United States v. Mills*, 704 F.2d 1553 (11th Cir. 1983), a federal prisoner was prosecuted for the murder of another prisoner. The government's theory was that the murder was committed pursuant to a contract by the Aryan Brotherhood—a prison gang which attempted to control drug traffic within the institution. The court admitted testimony on the organization, history and activities of the Aryan Brotherhood. The court concluded that this testimony

pertained to a chain of events forming the context, motive, and set-up of the crime. To make the crime comprehensible it was necessary for the government to show how the Aryan Brotherhood functioned, that Mills was a member of the Aryan Brotherhood, that

⁷ The government's theory was that Bufalino could prevail on Fratianno to have Napoli killed because both were members of La Cosa Nostra, an organization whose members performed murders for one another as a matter of professional courtesy. 683 F.2d at 647.

an affront to a fellow member might serve as an adequate motivation for Mills to kill a person whom he barely knew

Id. at 1559. In *Mills*, membership in the Aryan Brotherhood became an integral and natural part of the government's account of the crime.

In the instant case, the reference to a secret, prison organization was not linked in any manner to the crime charged; it did not form part of the account of the circumstances of the crime nor was the reference necessary to complete a story of the crime charged. Indeed, the charge was a simple bank robbery. The issue at trial was identity, and the prosecution's theory of the case in no way implicated any association or group as the perpetrator. It is clear that this disputed evidence was not related to petitioner's proof of the charged crime—bank robbery.

4. Mere membership in an organization does not prove that a member has espoused the beliefs of the organization.

Mills' impeachment was based on his alleged membership in an organization which required its members to lie, cheat, steal or kill for another member. The impeachment resulted from Mills' alleged membership alone. There was no evidence that he had, in fact, accepted the tenets of the organization. Nor was there any evidence that he had ever lied or expressed a willingness to lie.

The impeachment of Mills was, thus, a prejudicial ploy to taint his character through "guilt by association." By permitting this impeachment, the district court failed to recognize that credibility or lack thereof is a personal trait. A witness should not be impeached on the basis of his membership. To permit such impeachment is analogous to permitting a witness' impeachment because he has friends or relatives who are liars. Case law abundant-

ly shows that a witness should not be cross-examined or impeached because of his associations. *See United States v. Ochoa*, 609 F.2d 198, 204 (5th Cir. 1980) (cross-examination with respect to offenses of defendant's brother, brother-in-law, and friend constituted prejudicial error); *United States v. Vigo*, 435 F.2d 1347, 1351 (5th Cir.), *cert. denied*, 403 U.S. 908 (1971) (cross-examination with respect to the prior heroin conviction of defendant's husband warranted reversal). *See also United States v. Labarbera*, 581 F.2d 107, 109 (5th Cir. 1978); *United States v. Turcotte*, 515 F.2d 145 (2d Cir.), *cert. denied*, 423 U.S. 1032 (1975); *United States v. Crawford*, 438 F.2d 441 (8th Cir. 1971); *United States v. Gossler*, 339 F.2d 102, 112 (6th Cir.), *cert. denied*, 382 U.S. 819 (1964).

In the case at bar, Mills was impeached not because he had lied previously or even because he had a reputation for lying. Rather, he was impeached because the organization to which he allegedly belonged asked its members to lie. Petitioner argues that the impeachment of Mills was proper.⁸ Petitioner obviously ignores the abundance of support in law for the proposition that a witness cannot be discredited because of his alleged association with "bad people."

Petitioner's insistence about the admissibility of the disputed evidence results from an incorrect premise. Petitioner argues that the evidence of the perjury oaths showed the jurors what they would have been permitted to infer from the fact that Mills and respondent belonged to the same group.⁹

⁸ Petitioner cites no case law or treatise to support its argument.

⁹ Petitioner makes no distinction between showing partiality or proving perjury. The mother of a defendant if called by the defense may be cross-examined regarding her relationship with the defendant. The trier of fact should, of course, be apprised of her relationship

Petitioner ignores the fact that membership in an organization alone, is insufficient to prove a person's beliefs or practices. For example, one may join Alcoholic's Anonymous, but not remain sober. One may join an athletic club but not be an athlete. One may join a ski club but have never skied before. There are many diverse reasons why people join clubs and organizations. Further, one cannot assume that members of an organization would be willing to "color their testimony" or risk perjury charges to favor and protect an accused member.

Two cases decided by this Court further illustrate the principle that merely joining an organization is not dispositive of the member's acceptance of the organization's beliefs or tenets. *See Scales v. United States*, 367 U.S. 203 (1960); *Brandenburg v. Ohio*, 395 U.S. 444 (1968).

In *Scales*, this Court recognized that a person's association with a particular group cannot be used against an individual unless it is proven that the individual is an "active" and "knowing" member of the organization. *Scales*, 367 U.S. at 209.

Although *Scales* presents distinguishable facts from the present case, the reasoning propounded by the Court is certainly applicable. *Scales* involved a statutory prosecution for membership in the Communist Party. To sustain a conviction under the Smith Act, *Scales* required a showing of both a member's knowledge of the organization's illegal advocacy and "active" membership therein.

In the later case of *Brandenburg v. Ohio*, 395 U.S. 444 (1968), a leader of the Ku Klux Klan was convicted under

and weigh this factor in its consideration of the weight to give her testimony. The fact of her relationship, however, does not *prove* she is lying. There is a distinction, therefore, between the possible slanting of one's testimony and the actual commission of perjury. Petitioner failed to recognize this distinction.

an advocacy statute. *Brandenburg* held that the statute purported to punish mere advocacy. Its effect was to forbid assembly with others to advocate the beliefs of the Ku Klux Klan. The Court held mere advocacy was insufficient to justify punishment. The Court required that the advocacy create a clear and present danger before criminal prosecution of an individual was permissible under the first amendment. *Id.* at 450-51.

The discussions in *Scales* and *Brandenburg* recognize that individuals join organizations for a variety of reasons. One may become a card carrying member of the Communist Party and believe and support the economic system it represents, but not adopt all the tenets of the organization. Not all members, however, are "active" (as required by *Scales* and *Brandenburg*) so as to justify prosecution. Nor would all members be willing to support a violent overthrow of the incumbent government, though this is a tenet of Communism. Therefore, although a member may hope for a "better system," he may not actively participate in bringing about such a change if it requires violence.

Similarly, a Caucasian man incarcerated in a federal prison may join the Aryan Brotherhood for protection in light of the frequent racial confrontations. Yet, simply joining the organization does not mean he would deny the organization's existence nor does it mean he would commit perjury for another member.¹⁰ For the same reasons that membership alone is insufficient to support any criminal conviction, mere membership here should not have

¹⁰ Ehle himself testified to being directly connected with the Aryan Brotherhood; yet he testified to the organization's existence and the alleged tenets in violation of the organization's code. (J.A. 44).

been allowed for impeachment purposes.¹¹ There was no direct evidence that Mills had accepted or complied with the alleged perjury oath. The organization's tenets established nothing about his own beliefs and practices. Thus, the rebuttal testimony of Ehle was improperly admitted to impeach Mills.¹²

5. Assuming the impeachment evidence showed bias, the trial judge abused his discretion in permitting its introduction.

Assuming that the disputed cross-examination and rebuttal testimony bore on Mills' bias, the trial court, nevertheless, abused its discretion in permitting its introduction. The disputed evidence should have been precluded because there were other adequate means to show bias that did not infringe on respondent's right to a fair trial.

Although a trial court has great leeway in how and when bias may be proven, *Davis v. Alaska*, 415 U.S. 308

¹¹ Although petitioner argued that evidence refuting the government's theory regarding the bias of Mills could have been offered, any attempt to do so would have been futile. The only way to effectively refute the proffered Ehle testimony would be if Mills admitted his membership but denied accepting the organization's tenets, i.e., he would not commit perjury to protect another member. Since Mills had already denied his membership, this was not a feasible alternative. Moreover, even if there was a feasible alternative, the evidence remained inadmissible.

¹² Petitioner argued that the Ninth circuit erroneously considered Mills' first amendment associational rights. (Pet. Brief at 19). Petitioner misinterpreted the court of appeal's decision. The court of appeals at no time indicated that Mills' associational rights had been abridged. Rather, the court stated that the judge's discretion in admitting evidence did not extend to allowing impeachment by association. The court was clearly concerned about the relevancy of the witness' association. The references to the first amendment cases of *Scales* and *Brandenburg* were illustrative.

(1974), there are limitations on introducing evidence to establish bias. See *Blair v. United States*, 401 F.2d 387, 389 (D.C. Cir. 1968). First, the proffered evidence must tend to show bias is more or less probable than it would be without it. Second, the judge has discretion to limit the extent of the proof.¹³ In exercising this discretion a judge should consider all the particular circumstances in a given case.

In *Skinner v. Cardwell*, 564 F.2d 1381 (9th Cir. 1977), *cert. denied*, 435 U.S. 1009 (1978), the Ninth Circuit discussed this exercise of a judge's discretion. It was stated in *Skinner* that the test to apply was based on whether counsel has been afforded an adequate opportunity to cross-examine a witness. "The test for whether cross-examination about a relevant topic was effective, i.e., whether the trial court has abused its discretion, is whether the jury is otherwise in possession of sufficient information upon which to make a discriminating appraisal of the subject matter at issue." *Id.* at 1389, See also *United States v. Cutler*, 676 F.2d 1245, 1249 (9th Cir. 1982); *United States v. Salsedo*, 607 F.2d 318, 321 (9th Cir. 1979); *United states v. Bleckner*, 601 F.2d 382, 385 (9th Cir. 1979).

In any criminal case the judge has discretion to admit extrinsic proof. He also has, however, "the responsibility for seeing that the sideshow does not take over the circus." *United States v. Brown*, 547 F.2d 438, 446 (8th Cir.), *cert. denied*, 430 U.S. 937 (1977). In this case, the trial judge abused his discretion by allowing cross-examination of Mills that unfairly prejudiced respondent. Before the objectionable testimony was elicited, the jury had sufficient information to apprise the bias and motive

¹³ A third unrelated limitation is exclusion due to constitutional exclusionary rules such as the privilege against self-incrimination.

of Mills. The prosecutor elicited that Mills was a friend of respondent's and that he (Mills) had become acquainted with him over a nineteen month period.¹⁴ The prosecutor had also inquired if Mills and respondent belonged to an organization together. Mills denied such membership. In permitting petitioner to impeach Mills with evidence that he allegedly belonged to a secret, prison organization that had as one of its tenets that its members would lie for one another, the district court allowed "the sideshow" to "take over the circus." The jury necessarily lost focus of the charge—bank robbery. There were references to secret, prison organizations, restrictive membership, perjury oaths, death threats and suicide missions. (J.A. 42, 43, 44). Using a very wide brush, petitioner painted an odious picture of respondent. He was portrayed as an evil person who lied, cheated, stole and killed.

¹⁴Q Now, you say you're a real close friend of Mr. Abel?

A No. I'm—I wouldn't say a real close friend. We were acquaintances. We were friends. I knew him; he knew me.

Q How did you know him?

A Well, when he was on—I'll refer to the main line as "population"—I was in the hole for about nineteen months. I came to the visiting room every day, and I would see John out there, and periodically got to know him over that nineteen months.

Q Where was this main line?

A That's the population of the prison.

Q What prison?

A Lompoc.

Q All right. Do you and John, Mr. Abel, belong to any organization together?

A No, I don't (J.A. 36).

The prosecutor had the opportunity to pursue this proper line of questioning but chose not to do so. Thus, he could have properly asked Mills regarding the quality, quantity and nature of his contacts with respondent.

B. The Prejudicial Harm Of The Evidence At Issue Out-weighed Its Probative Value.

Even if relevant, the admission of the disputed evidence was so prejudicial that the trial judge should have excluded the evidence pursuant to Rule 403 of the Federal Rules of Evidence. The introduction of the disputed evidence presented a picture of a ruthless organization of liars, cheats, thieves and murderers. Failure to have excluded this evidence constituted a clear abuse of discretion.

Petitioner failed to specifically address the prejudice to respondent. This failure is understandable since it is impossible to argue there was no prejudice given the inflammatory evidence that was presented. The trial was replete with references to a secret, prison organization and its accompanying odious tenets.

Ehle testified that the oath taken by members was that they would "lie, cheat, steal, kill," and do anything to protect another member; (J.A. 43); that it would be suicide for him (Ehle) to have told Mills he would testify falsely against respondent; (J.A. 44); that the penalty for doing such a thing was death. (J.A. 44). By referring to the organization by the perjorative term—"secret, prison organizaton"—the spectre of organized crime in prison was presented to the jury. Although respondent did not testify, Ehle testified that respondent was a "ranking member" of the secret, prison organization. (J.A. 42). The testimony introduced was of such an inflammatory nature as to create the serious danger that respondent was convicted in the eyes of the jury for being a "bad man," deserving of punishment, rather than of being a bank robber. See *United States v. Robinson*, 530 F.2d 1076, 1078-79 (D.C. Cir. 1976) (citing *United States v. Fox*, 473 F.2d 131, 135 (1972) (D.C. Cir. 1972). This

evidence was so prejudicial that it surely persuaded the jury to prejudge respondent as a bad man and thus deny him a fair opportunity to defend against the particular charge. *See Michelson v. United States*, 335 U.S. 469, 476 (1948).

Petitioner readily conceded that respondent's membership in the secret prison organization was not directly relevant to his guilt or innocence on the bank robbery charge and would have been inadmissible in the prosecutor's case-in-chief. (Pet. Brief at 25). Petitioner argued, however, that because respondent called Mills as a witness he necessarily brought upon himself such prejudice. There arose a "clear need to permit the jury to learn the powerful evidence of bias without which Mills' credibility could not be fairly assessed." (Pet. Brief at 26).

Even assuming that such a need arose, and that the rebuttal evidence showed bias, such evidence should not have been introduced because of the prejudice to respondent. Mills' alleged bias could have been shown by proving that Mills knew respondent, that they were friends and that they belonged to an organization together. The rest of the evidence did not prove bias, but clearly did prejudice the respondent.

The error in this case was reversible because respondent did not take the stand. As such, he did not put his credibility in issue. Yet, the prosecution, nevertheless, attacked his character through Kurt Ehle. Ehle's testimony implicated respondent as a sworn perjurer and respondent was convicted not for being a bank robber, but for belonging to a ruthless and odious organization.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be affirmed.

I respectfully submit,

PEYER M. HORSTMAN
Acting Federal Public Defender

By

YOLANDA BARRERA GOMEZ
Senior Deputy Federal Public Defender